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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO BAYKEEPER; SAVE THE
BAY; COMMITTEE FOR GREEN
FOOTHILLS; CITIZENS' COMMITTEE TO
COMPLETE THE REFUGE; and STATE OF
CALIFORNIA, by and through XAVIER
BECERRA, ATTORNEY GENERAL,

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY AND ITS ADMINISTRATOR,

Defendants.

REDWOOD CITY PLANT SITE, LLC,

Intervenor-Defendant.

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CASE NO: 3:19-cv-05941-WHA (lead case)

Consolidated with

No: 3:19-cv-05943-WHA

**PLAINTIFFS' NOTICE OF MOTION AND
CROSS-MOTION FOR SUMMARY
JUDGMENT AND OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: July 16, 2020

Time: 8:00 a.m.

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Judge: Hon. William H. Alsup

TABLE OF CONTENTS

	<u>Page No.</u>
NOTICE OF MOTION AND MOTION FOR CROSS-SUMMARY JUDGMENT	1
MEMORANDUM OF POINTS AND AUTHORITIES	2
I. INTRODUCTION.....	2
II. LEGAL BACKGROUND	3
A. CWA Overview	3
B. Regulatory Definition of “Waters of the United States”	3
C. The CWA Section 404 Dredge and Fill Permit Program and Section 401 Certification Program	5
III. FACTUAL BACKGROUND	6
A. History of the Salt Ponds Site.....	6
1. Pre-1900 History of the Site’s Waters and Their Use by Indigenous People and Early-European Settlers	6
2. Industrial Salt Production at the Site	7
3. Construction of Levees and the Permitting History at the Site	8
4. The Salt Ponds Site Was and Remains Navigable.....	11
5. The Salt Ponds are Inextricably Linked to the Aquaculture and Ecosystem of the Bay	11
B. The EPA Decision Making Process.....	13
1. Cargill’s Requests for Jurisdictional Determination.....	13
2. EPA’s Assumption of Authority over the Jurisdictional Determination	14
3. EPA Region 9 Prepares a JD Concluding that 1,270 Acres of the Site are Jurisdictional “Waters of the United States” Under the Clean Water Act	14
4. The Trump Administration EPA’s Final JD Conflicts with Region 9’s Findings	15
IV. STANDING	15
A. California has Standing to Bring this Action.....	15
B. Each Nonprofit Plaintiff Has Standing	18

1	V. ARGUMENT	20
2	A. Summary of Argument	20
3	B. Standard of Review.....	21
4	C. The Site Consists of Waters of the United States	23
5	1. The Site Contains Traditionally Navigable Waters	23
6	2. The Site is an Impoundment of Waters of the United States.....	24
7	3. The Site is Adjacent to Waters of the United States.....	25
8	4. The Site Has a Significant Nexus to Waters of the United States	26
9	D. EPA’s Reliance on the Fast Land Doctrine was Contrary to Law	28
10	1. The Fast Land Doctrine	29
11	2. EPA Incorrectly Interpreted and Applied <i>Milner</i> and <i>Froehlke</i> in	
12	Determining the Site is Fast Land	29
13	3. The Salts Ponds were not Dry Lands and were not Filled prior to	
14	the Clean Water Act.....	31
15	E. The Final Jurisdictional Determination was Arbitrary and Capricious	33
16	1. The Historical Permitting at the Site does not Support EPA’s	
17	Conclusion	33
18	2. EPA’s Characterization of the Site as “Industrial” is Incorrect and	
19	Immaterial to whether the Site is Fast Land	33
20	3. EPA Ignored Region 9’s Findings and Failed to Explain its Reversal	
21	of Position.....	34
22	VI. REMEDY	36
23	VII. CONCLUSION	37

TABLE OF AUTHORITIES

Page No.(s)

Cases

<i>Air All. Houston v. EPA</i> 906 F.3d 1049 (D.C. Cir. 2018).....	18
<i>All. for the Wild Rockies v. U.S. Forest Serv.</i> 907 F.3d 1105 (9th Cir. 2018)	36
<i>Appalachian Electric Power Co.</i> 311 U.S. 377 (1940).....	23
<i>Barnes v. U.S. Dep’t of Transp.</i> 655 F.3d 1124 (9th Cir. 2011)	34
<i>Benjamin v. Douglas Ridge Rifle Club</i> 673 F. Supp. 2d 1210 (D. Or. 2009)	24
<i>Brown v. City of Los Angeles</i> 521 F.3d 1238 (9th Cir. 2008)	18
<i>California v. Azar</i> 911 F.3d 558 (9th Cir. 2018)	18
<i>California v. EPA</i> 385 F. Supp. 3d 903 (N.D. Cal. 2019).....	16, 18
<i>Citizens to Preserve Overton Park v. Volpe</i> 401 U.S. 402 (1971).....	22
<i>Coeur Alaska v. Bonneville Power Admin.</i> 557 U.S. 261 (2009).....	36
<i>Ctr. for Biological Diversity v. Nat’l Highway Safety Admin.</i> 538 F.3d 1172 (9th Cir. 2008)	23
<i>Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.</i> No. C04-04324 WHA, 2005 WL 2000928 (N.D. Cal. Aug. 19, 2005).....	36
<i>Ctr. for Biological Diversity v. Zinke</i> 868 F.3d 1054 (9th Cir. 2017)	21, 35
<i>Ctr. for Env’tl. Health v. Vilsack</i> No. 15-cv-01690-JSC, 2016 WL 3383954 (N.D. Cal. June 20, 2016).....	36
<i>Deerfield Plantation Phase II-B Prop. Owners Ass’n, Inc. v. U.S. Army Corps of Engineers</i> 501 F. App’x 268 (4th Cir. 2012).....	19
<i>Desert Survivors v. U.S. Dep’t of Interior</i> 321 F. Supp. 3d 1011 (N.D. Cal. 2018).....	21, 35
<i>Ecological Rights Found. v. Pac. Lumber Co.</i> 230 F.3d 1141 (9th Cir. 2000)	18, 19

1	<i>F.C.C. v. Fox Television Stations, Inc.</i>	
2	556 U.S. 502 (2009).....	34
3	<i>Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.</i>	
4	528 U.S. 167 (2000).....	18, 19
5	<i>Golden Gate Audubon Soc., Inc. v. U.S. Army Corps of Eng'rs</i>	
6	796 F. Supp. 1306 (N.D. Cal. 1992).....	20, 31
7	<i>Hunt v. Wash. State Apple Advert. Comm'n</i>	
8	432 U.S. 333 (1977).....	18
9	<i>Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine</i>	
10	<i>Fisheries Serv.</i>	
11	109 F. Supp. 3d 1238 (N.D. Cal. 2015).....	36
12	<i>Leslie Salt Co. v. Froehlke</i>	
13	578 F.2d 742 (9th Cir. 1978).....	20, 29, 30, 31
14	<i>Lujan v. Defenders of Wildlife</i>	
15	504 U.S. 555 (1992).....	16
16	<i>Massachusetts v. U.S. Envtl. Prot. Agency</i>	
17	549 U.S. 497 (2007).....	16
18	<i>Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.</i>	
19	463 U.S. 29 (1983).....	21, 22, 34, 36
20	<i>NRDC, Inc. v. Pritzker</i>	
21	828 F.3d 1125 (9th Cir. 2016).....	22
22	<i>Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.</i>	
23	18 F.3d 1468 (9th Cir. 1994).....	22
24	<i>Ocean Advocates v. U.S. Army Corps of Eng'rs</i>	
25	402 F.2d 846 (9th Cir. 2005).....	22
26	<i>Ohio v. U. S. Army Corps of Eng'rs (In re EPA & DOD Final Rule)</i>	
27	803 F.3d 804 (6th Cir. 2015).....	4
28	<i>Organized Vill. of Kake v. U.S. Dep't of Agric.</i>	
	795 F.3d 956 (9th Cir. 2015).....	34
	<i>Rapanos v. United States</i>	
	547 U.S. 715 (2006).....	3, 4, 21, 26
	<i>Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.</i>	
	547 U.S. 47 (2006).....	18
	<i>S.D. Warren Co. v. Maine Bd. of Envtl. Prot.</i>	
	547 U.S. 370 (2006).....	25
	<i>Se. Alaska Conserv. Council v. U.S. Army Corps of Eng'rs</i>	
	486 F.3d 638 (9th Cir. 2007), rev'd on other grounds sub nom.	
	<i>Coeur Alaska v. Bonneville Power Admin.</i> , 557 U.S. 261 (2009).....	36

1	<i>Skidmore v. Swift & Co.</i>	
2	323 U.S. 134 (1944).....	22
3	<i>Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs</i>	
4	531 U.S. 159 (2001).....	3, 20, 32
5	<i>Sound Action v. U.S. Army Corps of Engineers</i>	
6	No. C18-0733JLR, 2019 WL 446614 (W.D. Wash. Feb. 5, 2019).....	19
7	<i>Spokeo, Inc. v. Robins</i>	
8	136 S. Ct. 1540 (2016).....	15, 16
9	<i>State of California v. U.S. Dep't of the Interior</i>	
10	381 F. Supp. 3d 1153 (N.D. Cal. 2019).....	36
11	<i>U.S. Army Corps of Engineers v. Hawkes Co.</i>	
12	136 S. Ct. 1807 (2016).....	22
13	<i>U.S. v. Moses</i>	
14	496 F.3d 984 (9th Cir. 2007), <i>cert. denied</i> , 128 S. Ct. 2963 (2008).....	23, 25
15	<i>United States v. Ciampitti</i>	
16	583 F. Supp. 483 (D.N.J. 1984), <i>aff'd</i> , 772 F.2d 893 (3rd Cir. 1985), <i>cert. denied</i> , 467 U.S. 1014 (1986).....	32
17	<i>United States v. Cundiff</i>	
18	555 F.3d 200 (6th Cir. 2009), <i>cert. denied</i> , 558 U.S. 818 (2009).....	27
19	<i>United States v. Detroit Timber & Lumber Co.</i>	
20	200 U.S. 321 (1906).....	22
21	<i>United States v. Mead Corp.</i>	
22	533 U.S. 218 (2001).....	22, 23
23	<i>United States v. Milner</i>	
24	583 F.3d 1174 (9th Cir. 2009).....	passim
25	<i>United States v. Riverside Bayview Homes, Inc.</i>	
26	474 U.S. 121 (1985).....	3, 21, 29
27	<i>WildEarth Guardians v. Provencio</i>	
28	923 F.3d 655 (9th Cir. 2019).....	21, 34, 36
	Statutes	
	5 U.S.C. § 551.....	20
	5 U.S.C. § 706.....	21, 23, 32, 36
	33 U.S.C. § 1251.....	3
	33 U.S.C. § 1311.....	3
	33 U.S.C. § 1341.....	5

1	33 U.S.C. § 1342.....	3
2	33 U.S.C. § 1344.....	3, 5, 17
3	33 U.S.C. § 1362.....	3
4	Cal. Gov. Code § 66602.1	17
5	Cal. Gov. Code § 66605(a)-(b)	17
6		
7	Rules and Regulations	
8	33 C.F.R. §§ 320.1(a)(6), 331.2.....	5
9	33 C.F.R. § 328.3(a) (2015–2019).....	4
10	33 C.F.R. § 328.3(a)(3) (1987–2015).....	3
11	40 C.F.R. § 122.2(c) (1981–2015).....	3
12	40 C.F.R. § 122.2(c) (2015–2019).....	4
13	40 C.F.R. § 230.3(o)(1) (2015–2019).....	4, 23, 24, 25, 26
14	40 C.F.R. § 230.3(o)(3) (2015–2019).....	25, 26, 31
15	80 Fed. Reg. 37,054 (June 29, 2015).....	4, 24, 25, 26, 27
16	84 Fed. Reg. 56,626 (Oct. 22, 2019)	4
17		
18	Other Authorities	
19	S. Rep. No. 92–1236, 92d Cong., 2d Sess. 144 (1972) (Conf. Rep.)	3
20		
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TO DEFENDANT AND HIS ATTORNEYS OF RECORD:

This motion is based on this Motion and Memorandum of Points and Authorities, the Declarations of Bryan Beck, Sejal Choksi-Chugh, Matt Leddy, David Lewis, Robert Most, Thomas Mumley, Gail Raabe, and Marc Zeppetello, filed herewith, the EPA's Administrative Record, and the Court's entire file in this litigation.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Under the Clean Water Act (“CWA” or “Act”), a property owner may request that the United
4 States Environmental Protection Agency (“EPA”) make a final and binding “jurisdictional
5 determination” as to whether a parcel contains waters of the United States. Waters of the United
6 States are jurisdictional and are protected by the Act. Lands that do not contain waters of the United
7 States fall beyond the Act’s bounds. In 2012, Cargill requested a final jurisdictional determination
8 over whether its Redwood City Salt Ponds site (“Site”) along the San Francisco Bay in Redwood City
9 contained waters of the United States. Nearly seven years later, the Trump administration’s EPA
10 concluded there were no regulable waters at the Site. EPA’s 2019 decision rests on a faulty legal
11 premise, disregards decades of evidence collected by the professionals at EPA’s regional office, and
12 fails to engage in any analysis of what constitutes waters of the United States.

13 For four and a half years, EPA’s regional office, Region 9, acted as technical support for the
14 jurisdictional determination. Region 9 completed its analysis in a November 2016 Draft
15 Jurisdictional Determination concluding the vast majority of the Site consisted of jurisdictional
16 waters (“Region 9 JD”). But the transition to a new administration in 2017 meant a final JD was not
17 issued—and nothing happened for nearly two years. Then, in March 2019, based upon two meetings
18 (at least one including Cargill) and a handful of internal communications, EPA announced a complete
19 reversal of Region 9’s conclusions.

20 On March 1, 2019, EPA issued a Negative Jurisdictional Determination (“Final JD”)
21 concluding the Site had been converted to fast land prior to the passage of the CWA. This was
22 legally incorrect—it misinterpreted the legal principles of the fast land doctrine and contradicted the
23 extensive evidence and historical facts about the Site. The Final JD was also arbitrary and capricious.
24 EPA provided no factual basis for its conclusions. Its characterization of the quality of the waters
25 and industrial nature of the Site are legally inconsistent with prior EPA positions. And, EPA’s final
26 decision ignores Region 9’s more thorough, well supported analysis without any recognition or
27 explanation of its change in position. The Site contains jurisdictional waters entitled to the
28 protections of the Clean Water Act. Accordingly, the Final JD should be vacated.

1 **II. LEGAL BACKGROUND**

2 **A. CWA Overview**

3 In 1972, Congress enacted the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*,
4 commonly known as the Clean Water Act, “to restore and maintain the chemical, physical, and
5 biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA established, among
6 other things, a national goal of eliminating all discharges of pollutants into navigable waters by 1985
7 and an “interim goal of water quality which provides for the protection and propagation of fish,
8 shellfish, and wildlife, and provides for recreation in and on the water ... by ... 1983.” *Id.*

9 The central requirement of the Act is a prohibition on the discharge of pollutants, including
10 dredge and fill materials, from point sources into “navigable waters” without a permit. *Id.* §§
11 1311(a), 1342, 1344, 1362(12). The term “navigable waters” is defined in Section 502(7) of the
12 CWA as “the waters of the United States, including the territorial seas.” *Id.* § 1362(7). Legislative
13 history indicates that the term “navigable waters” was intended to “be given the broadest possible
14 constitutional interpretation.” S. Rep. No. 92-1236, 92d Cong., 2d Sess. at 144 (1972) (Conf. Rep.).

15 **B. Regulatory Definition of “Waters of the United States”**

16 Although the CWA does not define “waters of the United States,” EPA and the Army Corps
17 of Engineers (“Army Corps” or “ACOE”) have defined the phrase in regulations and agency
18 guidance. The original regulatory definition was broad, and extended CWA jurisdiction to, *inter alia*,
19 all waters “the use, degradation, or destruction of which would affect or could affect interstate or
20 foreign commerce[.]” 40 C.F.R. § 122.2(c) (1981–2015 (EPA’s definition)); 33 C.F.R. § 328.3(a)(3)
21 (1987–2015 (Army Corps’ identical definition)). That definition was subject to repeated judicial
22 scrutiny. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985) (upholding
23 CWA jurisdiction over wetlands adjacent to a navigable lake); *Solid Waste Agency of N. Cook Cty. v.*
24 *U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (rejecting assertion of CWA jurisdiction over
25 isolated, wholly intrastate ponds that served as habitat for migratory birds); *Rapanos v. United States*,
26 547 U.S. 715, 753–57 (2006) (rejecting assertion of CWA jurisdiction over wetlands that do not abut,
27 or do not have significant nexus to, any navigable-in-fact water).

1 The definition was overhauled by the Obama administration in the so-called “Clean Water
2 Rule” which was jointly promulgated in 2015 by EPA and the Army Corps. *See* 80 Fed. Reg. 37,054
3 (June 29, 2015). After litigation over the Clean Water Rule ensued, the rule was stayed nationwide
4 until February 2018. *Ohio v. U. S. Army Corps of Eng’rs (In re EPA & DOD Final Rule)*, 803 F.3d
5 804, 809 (6th Cir. 2015). When the Jurisdictional Determination was issued in March 2019, the
6 Clean Water Rule was in effect in 22 states, including California, and was the controlling definition
7 of the phrase “waters of the United States” for purposes of determining whether the Salt Ponds Site is
8 subject to the CWA. 84 Fed. Reg. 56,626, 56,631 (Oct. 22, 2019); *see* 40 C.F.R. § 122.2(c) (2015–
9 2019); 33 CFR § 328.3(a)(3) (2015–2019).

10 The foundation of the Clean Water Rule was the “significant nexus” standard based on Justice
11 Kennedy’s controlling opinion in *Rapanos v. United States*, in which he explained that only those
12 wetlands or waters that significantly affect the integrity of other waters “more readily understood as
13 ‘navigable’” are themselves subject to the CWA’s protections. *Rapanos*, 547 U.S. at 780. The Clean
14 Water Rule defined “waters of the United States” to include: (1) “All waters which are currently
15 used, or were used in the past, or may be susceptible to use in interstate or foreign commerce,
16 including all waters which are subject to the ebb and flow of the tide;” (2) “All impoundments of
17 waters otherwise defined as waters of the United States;” (3) “All waters adjacent to [other waters of
18 the United States], including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;”
19 and (4) “All waters located within the 100-year floodplain” or “within 4,000 feet of the high tide line
20 or ordinary high water mark” of a traditional navigable water that “are determined on a case-specific
21 basis to have a significant nexus to” such water. 33 C.F.R. § 328.3(a) (2015–2019); 40 C.F.R. §
22 230.3(o) (2015–2019).¹

23
24
25
26 ¹ In 2019, the Clean Water Rule was repealed by the Trump administration and the prior regulations
27 were re-codified. 84 Fed. Reg. 56,626 (Oct. 22, 2019). In January 2020, EPA and the Army Corps
28 issued a pre-publication version of their narrower replacement definition of “waters of the United
States,” referred to as the “Navigable Waters Rule.” That rule has not been promulgated and is not
effective. All recent regulatory changes to the definition of “waters of the United States” remain
subject to extensive litigation in multiple venues nationwide.

1 **C. The CWA Section 404 Dredge and Fill Permit Program and Section 401**
2 **Certification Program**

3 Section 404 of the CWA establishes a program to regulate the discharge of dredged or fill
4 material into “waters of the United States.” 33 U.S.C. § 1344(a), (h). Both EPA and the Army Corps
5 have responsibilities for administering this program. The Army Corps administers the Section 404
6 program in California, including making individual permit decisions and jurisdictional determinations
7 regarding whether a particular waterbody is subject to the CWA for purposes of implementing
8 Section 404’s permitting requirements. *See* 33 C.F.R. §§ 320.1(a)(6), 331.2. EPA develops policy,
9 guidance, and environmental criteria used in evaluating Section 404 permit applications.

10 Pursuant to a 1989 memorandum between the two agencies, EPA has the authority to take
11 over from the Army Corps jurisdictional determinations under Section 404 by designating certain
12 decisions as “special cases.” Memorandum of Agreement: Determination of Geographic Jurisdiction
13 of the Section 404 Program and Application of Exemptions Under CWA Section 404(f) (“MOA”).²
14 Under the MOA, final determinations of the geographic jurisdictional scope of waters of the United
15 States must be made by the Regional Administrator of the affected EPA region. *Id.* § VI.A. All final
16 determinations are “binding on the Government and represent the Government’s position in any
17 subsequent Federal action or litigation concerning that final determination.” *Id.*

18 Pursuant to Section 401 of the CWA, states are authorized to review projects requiring federal
19 permits, including Section 404 permits issued by the Army Corps, to determine whether such projects
20 comply with state law requirements. 33 U.S.C. § 1341. States can approve requests for certification,
21 impose conditions to ensure projects meet state law requirements, or deny certification requests. *Id.* §
22 1341(a)(1). No federal permit may be issued for a project if a state has denied a Section 401
23 certification request. *Id.* Conditions imposed in state Section 401 certifications must become
24 conditions in federal permits, including Section 404 dredge and fill permits. *Id.* § 1341(d). The State
25 Water Resources Control Board and its nine Regional Water Quality Control Boards review and take
26 Section 401 certification actions on Section 404 permits issued by the Army Corps. *See* Declaration

27 _____
28 ² The MOA is *available at*: <https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and>.

1 of Thomas Mumley in Support of Plaintiffs’ Combined Opposition to and Cross-Motion for
2 Summary Judgment (“Mumley Decl.”), ¶¶ 4–5, submitted herewith.

3 **III. FACTUAL BACKGROUND**

4 The Site comprises 1,365 acres located in Redwood City, California. It is owned by Cargill
5 Point, LLC, an affiliate of Cargill, Inc. Dkt. #56, EPA Mot. at 6. The Final JD under review was
6 requested by Intervenor-Defendant Redwood City Plant Site, LLC, which has previously proposed to
7 develop the Site with a mix of residential, commercial, and other buildings and structures. *See* AR 16
8 at 17–18 (Cargill’s JD Request at 2–3).³

9 The Site is bordered by navigable tributaries of the San Francisco Bay. These tributaries
10 include Redwood Creek, First Slough, Westpoint Slough, and Flood Slough. The Site is historically
11 marshland subject to inundation periods and, prior to levee construction, contained a network of tidal
12 sloughs. Complaint for Declaratory Relief and Injunctive Relief, Dkt. #1 (“Baykeeper Compl.”), ¶
13 64; Defendants’ Answer to Plaintiffs’ Complaint, Dkt. #24 (“EPA Baykeeper Answer”), ¶ 64.

14 The Site is also adjacent to federal and state protected lands Plaintiffs have advocated to
15 protect, including the Don Edwards National Wildlife Refuge, Ravenswood Open Space Preserve,
16 and the Palo Alto Baylands Preserve. The Site was identified by U.S. Fish and Wildlife Service for
17 proposed addition to the Don Edwards National Wildlife Refuge due to its value to the ecosystem and
18 wildlife habitats in the southern end of San Francisco Bay. Baykeeper Compl., ¶ 65; EPA Baykeeper
19 Answer, ¶ 65; State of California Complaint, Case No. 3:19-cv-05943-WHA, Dkt. #3 (“State
20 Compl.”), ¶ 51; Defendants’ Answer to State’s Complaint, Case No. 3:19-cv-05943-WHA, Dkt. #16
21 (“EPA State Answer”), ¶ 51.

22 **A. History of the Salt Ponds Site**

23 1. Pre-1900 History of the Site’s Waters and Their Use by Indigenous People and
24 Early-European Settlers

25 The Site was originally tidal marsh connected by sloughs to the San Francisco Bay through
26 Redwood Creek and Westpoint Slough. *See* AR 577 at 611 (SFEI Technical Memo). Before

27 ³ Citations to the AR are to the Administrative Record as follows: “AR [‘Number’ from ECF 53-3]
28 at [bates pin cite] (‘document name’). Plaintiffs are lodging with the Court a USB drive
containing the entire AR as produced by EPA on March 4 and supplemented on March 11 and 12.

1 industrial operations, the Site “was part of a vast and contiguous tidal marsh complex in the South
2 San Francisco Bay.” *Id.* The Site “abounded with fish and game species, crystallized salt by natural
3 evaporation, swelled with tidal sloughs, and provided raw materials.” *Id.* “Highly accurate maps and
4 documents” show that the tidal channels at the Site ranged in depth and “all . . . would have carried
5 water at high tide.” *Id.* at 611–12.

6 Use of the Site for navigation and commerce purposes, including salt production, extends
7 back to the Ohlone people who used the tidal marsh channels and salt that crystallized each summer
8 as a valuable trading commodity. AR 577 at 606 (SFEI Technical Memo). The indigenous process
9 used to harvest salt was “not dissimilar to the one used today.” *Id.*; *see also Id.* at 607. Documented
10 commercial navigation of the Site dates back to the 1830s. *Id.* at 607.

11 Following the annexation of California, the Town of Mezesville (later Redwood City) became
12 an important hub for shipping and lumber. *See* AR 577 at 607 (SFEI Technical Memo). In the
13 second half of the nineteenth century, Redwood Creek was “navigable at high tide for vessels
14 drawing six or seven feet of water.” *Id.* By the turn of the twentieth century, commercial uses had
15 expanded and “dredging was required to keep Redwood Creek navigable.” *Id.*; *see also Id.* at 608.
16 “[F]ishers, hunters, stockmen, and salt makers all participated in a thriving economy based on the
17 estuary and its shoreline.” *Id.* at 609 (internal quotation omitted).

18 2. Industrial Salt Production at the Site

19 Between 1901 and 1905 construction of three separate salt works began at the Site. *See* AR
20 577 at 609 (SFEI Technical Memo). The salt works operations “were eventually incorporated by one
21 of the various iterations of the Leslie Company, and shipped large quantities of salt via Redwood
22 Creek to a variety of industries in the West.” *Id.* (internal quotation omitted). Around this time levee
23 construction occurred at various locations at the Site. *See Id.* In the forty years following World War
24 I, industrial salt production at the Site expanded. *See Id.* at 610. In 1943 and 1944, “levees were
25 repaired and new ones built.” *Id.* “A private wharf and new crystallizer beds were completed” in
26 1951 and a “bevy of growth” occurred in the decade that followed. *Id.*

By the 1970s, salt production had decreased, but other commercial uses like harvesting brine shrimp for aquaculture and marketing bittern for a range of uses had begun. *See* AR 577 at 610–11 (SFEI Technical Memo). Cargill exported salt from the ponds as recently as 1992. *See id.* at 611.

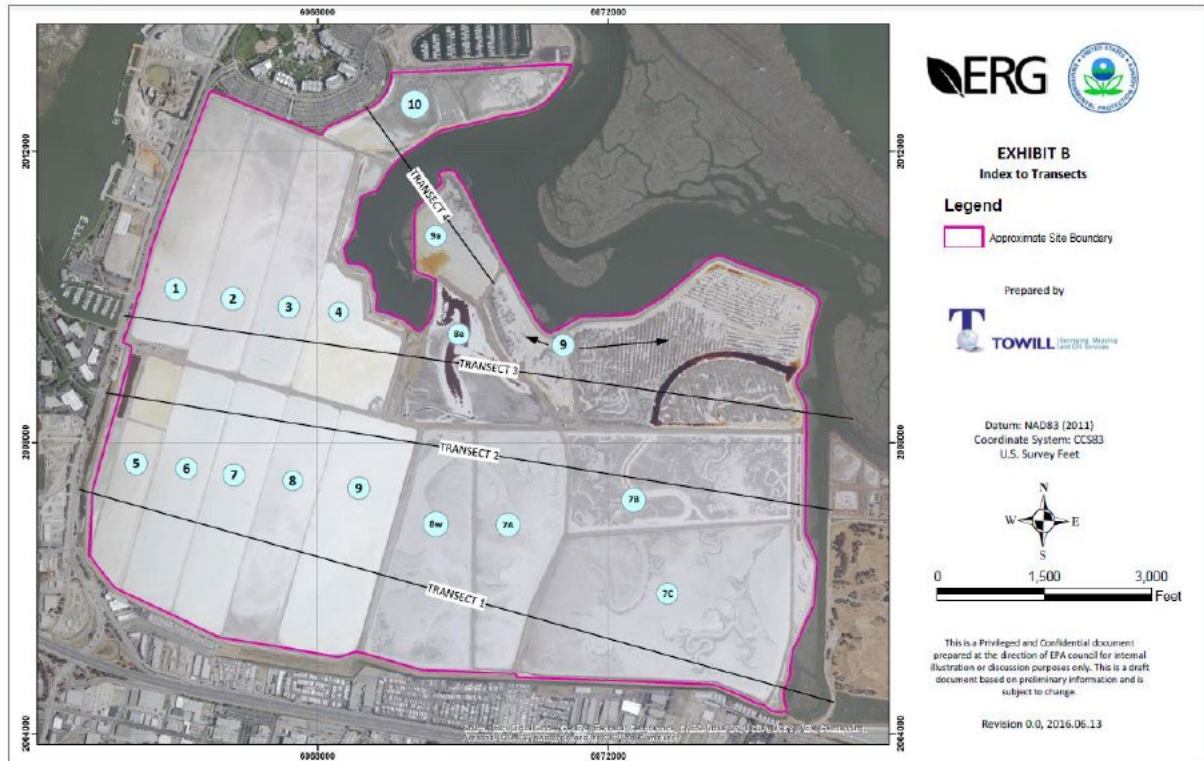


Figure 4a. Vertical and Horizontal Depth Characterization of Redwood City Salt Ponds in Relation to Mean High Water, Index to Survey Transects (from Appendix X)

AR 2050 at 2053.

3. Construction of Levees and the Permitting History at the Site

In 1940, the Department of Army issued a permit to Stauffer Chemical Company that “authorized levee construction (placement of dredged sediment) on the salt marsh banks, above tidal channels along Westpoint Slough and its tributaries, as well as across the First Slough[.]” AR 2593 at 2608 (Peter Baye, Regulatory Analysis of CWA Jurisdiction at Redwood City Salt Ponds, April 2010 (“Baye Analysis”)). The 1939 Public Notice for this permit application stated the proposal was to “... construct about three miles of earth levee from the proposed dam extending along the southerly bank of Westpoint Slough.” *Id.* The permit contained a limitation that it “merely expresses the assent of the federal government so far as concerns the public rights of navigation” and reserved the right of the Secretary of War to require the “remov[al] or alter[tion] of the structural work ... without

1 expense to the United States, so as to render navigation reasonably free, easy, and unobstructed.” AR
2 113 at 115 (1940 Permit at Condition (f)).

3 These levees, and subsequent ones, built with permits because they filled waters of the United
4 States, did not change the topographical character of the Site or the elevation of the waters
5 impounded by the levees. At the time the levees were built, the water they impounded was below the
6 mean high water in the San Francisco Bay. *See* AR 2593 at 2618 (Baye Analysis); AR 577 at 612
7 (SFEI Technical Memo). In 1947, the War Department issued a permit to allow dredged material to
8 fill parts of the western portion of the Site. *See* AR 645. The dredged material was used to create
9 internal levees within the Site, and by 1951, the current crystallizer beds were constructed. *See* AR
10 77 at 95 (Michael Josselyn, Early History of Redwood City Salt Plant Site (“Early History Report”)).



21
22 **Photograph 31:** Additional view from Bedwell Bayfront Park, east of salt ponds, looking out over
23 Cargill’s Redwood City facility. Flood Slough is in the foreground, with the pickle ponds
immediately behind.

24 AR 3695 at 3712.

25 In 1951 a permit was issued to build an eight-inch pipeline across the Dumbarton Strait to
26 connect the Redwood City Site to the Leslie Salt Co.’s Newark salt ponds complex on the other side
27 of the Bay, and in 1964, a permit allowed a twenty-inch pipeline to be installed. *See* AR 1 at 8 (Final
28 JD); *see also* AR 639 at 640 (Permit Matrix). Prior to connecting the Redwood City plant to the

1 Newark plant, the Site took Bay water directly via intake manifolds and pumps. *See* AR 77 at 81
2 (Early History Report); *see also* AR 1107 at 1109 (Feb. 28, 2002 Letter from Cargill to EPA). At
3 least as recently as 2002, Cargill imported Bay water from First Slough through an intake pipe
4 (located between ponds 4 and 8E) to desalt the crystallizer beds and desalting pond. *See* AR 1107 at
5 1109 (Feb. 28, 2002 Letter from Cargill to EPA); AR 796 at 831–32 (Cargill Maintenance Report,
6 Oct. 2002).

7 Cargill uses the intake pipes to discharge rainwater from the Site into First Slough and
8 eventually the Bay in accordance with CWA Section 402 National Pollutant Discharge Elimination
9 System (“NPDES”) permit and Waste Discharge Requirements (“WDRs”). *See* AR 663 and AR 667
10 (RWQCB Orders 82-59 and 88-163 for Individual NPDES permit and WDR CA0028690); AR 6180
11 and AR 678 (SWQCB Orders 91-13DWQ and 97-03DWQ). In 2000 and 2001, Cargill built new
12 intake pipes on Pond 1 of the Ravenswood Complex (formerly part of the Redwood City salt pond
13 complex) to bring in Bay water to improve brine flow at the Site. *See* AR 6157 at 6158–59 (Cargill
14 Maintenance Report Aug. 1999); AR 6169 at 6170 (Cargill Maintenance Report Sept. 2000).

15 Before the CWA was passed, Cargill disposed of bittern, a solution which remains after salt
16 has crystalized out of seawater or brine that results from the salt process, directly into the Bay from
17 the ponds. Since 1972 and the passage of the CWA, Cargill’s discharge of bittern has been regulated
18 under the CWA. This has included: (1) storage onsite in various ponds at different times (ponds 4,
19 8E, 9, 9A, and 10), (2) sent to the Newark plant via Cargill’s pipeline and/or barges, and (3)
20 discharged to San Francisco Bay as late as 2005. *See* AR 6192 (Regional Board Inspection Nov. 30,
21 2012); AR 6204 (Regional Board Staff Inspection Notes, Aug. 9, 1990); *see also* AR 796, 6169, 6157
22 (Cargill Maintenance Reports Oct 2002, Sept. 2000, Aug. 1999); *see also* AR 840, 852, 874, 904
23 (ACOE Permit Nos. 17040E98 (Aug. 30, 1988), 19009S98 (July 10, 1995), 2008-00146S (Apr. 17,
24 2008), and 2008-00160S (Sept. 10, 2010)).

25 The salinity of the liquids at a site are not relevant to determining CWA jurisdiction. *See* AR
26 2038 (EPA Office of the General Counsel Memorandum, Jan. 13, 2017); *see also* AR 2887 (1994
27 ACOE JD Memo re Cargill Napa Site at 1). The Site contains pickle ponds, crystallizers, and bittern
28 desalting ponds. EPA Mot. at 11; *see also* AR 2593 at 2646 (Salt in California, Bulletin 175, 1957);

1 AR 3528 at 3585 (BCDC Report, Oct. 2005). Despite the “extensive modifications” to the Site to
2 “levee[] and fill[] the tidal marsh to construct [the] industrial salt crystallizer ponds,” the Site exists at
3 “an intertidal elevation.” AR 577 at 612 (SFEI Technical Memo).

4 4. The Salt Ponds Site Was and Remains Navigable

5 Cargill is subject to federal and state permits pertaining to operations improvement and
6 maintenance activities, including dredge lock construction, levee repair and installation or
7 replacement of pipes. The operation and maintenance permits issued to Cargill covered system
8 improvement work, such as repairs of the crystallizer beds and installation pipeline and infrastructure
9 to pump brines and bittern from Redwood City to Newark. *See* AR 796, 6169, 6157 (Cargill
10 Maintenance Reports Oct 2002, Sept. 2000, Aug. 1999).

11 Between 1995 and 2009, Cargill’s permitted operation and maintenance work included
12 roughly fifteen different instances of maintenance work performed by its floating dredge, the
13 Mallard. *See* AR 2670 at 2671–72 (Memorandum of Record, Permitting History); *see also* AR 6225
14 at 6245–48 (1999–2000 Cargill Maintenance Report, describing maintenance by Mallard at the Site
15 and distinguishing between the Mallard and “land based equipment”); *see also* AR 2683 at 2693
16 (SFEI Geographic History of San Lorenzo Creek Watershed, describing 1995 work at the salt ponds
17 by the Mallard); AR 4155 (1992 Cargill Maintenance Report, describing work at the salt ponds by the
18 Mallard); *see also* AR 796 at 816 (Cargill 2001 Maintenance Report, describing Mallard’s work at
19 the Site). “The Mallard” accesses the salt ponds from Westpoint Slough through either of two dredge
20 locks adjacent to Ponds 9 and 9a. *See* AR 2050 at 2058, 2059 (Figures 8, 8a, depiction of Mallard
21 accessing ponds).

22 5. The Salt Ponds are Inextricably Linked to the Aquaculture and Ecosystem of
23 the Bay

24 The salt ponds have a significant impact on numerous species of wildlife living in or near the
25 San Francisco Bay. Baykeeper Compl., ¶ 77; EPA Baykeeper Answer, ¶ 77. Invertebrates, birds,
26 and mammals use the salt ponds for resting, breeding, nesting and feeding. *Id.* These organisms are
27 part of the food web that extends beyond the salt pond boundaries because they are mobile and
28 exchange carbon, nutrients, and other resources within the San Francisco Bay ecosystem. *Id.*

1 Further, birds and other animals that feed on organisms at the base of the salt pond food web export
2 nutrients to other parts of San Francisco Bay waters. *Id.*; *see also* AR 2050 at 2060 (Figure 9,
3 Trophic Structure of Redwood City Salt Ponds). This includes endangered species like the snowy
4 plover. *See* AR 2050 at 2062 (Figure 11, Photo of Federally endangered snowy plover foraging and
5 roosting at the site, December 2015).

6 The open waters of the salt ponds also transform and sequester nutrients and chemical
7 contaminants that could adversely impact water quality in the San Francisco Bay. Baykeeper
8 Compl., ¶ 78; EPA Baykeeper Answer, ¶ 78. Therefore, other organisms living in the San Francisco
9 Bay waters are directly impacted by the organisms that use the salt ponds. *Id.*

10 The Site's connection to the San Francisco Bay is also demonstrated by its role in the San
11 Francisco Bay's ecological food webs. *See* AR 2050 at 2060 (Figure 9, Trophic Structure of
12 Redwood City Salt Ponds). Nutrients and minerals are exchanged between the salt ponds and the San
13 Francisco Bay through waterfowl droppings, as birds regularly use the ponds for roosting and
14 feeding. Baykeeper Compl., ¶ 100; EPA Baykeeper Answer, ¶ 100. In addition to birds, various
15 species of small mammals, including foxes, regularly frequent the ponds and levees for hunting. *Id.*



Figure 10. (a) Two gray foxes (*Urocyon cinereoargenteus*) on Redwood City salt works levee road adjacent to Pond 10. Note roosting and feeding waterbirds within inundated Pond 10. Westpoint Marina in background (b) Single gray fox on levee road adjacent to Pond 10, Redwood City salt ponds. Photographs taken on February 2, 2013 at 11:03 am and 11:06 am by Matt Leddy.

AR 2050 at 2061.

1 Fish from the San Francisco Bay occasionally enter the Site's ditches through the tide gates
2 and are foraged by birds on the Site. *See* AR 2069 at 2080 (R.A. Leidy, Field Notes, Jan. 21, 2016).
3 The animals that rely on the salt ponds routinely move between the Site, surface waters, and the San
4 Francisco Bay, affecting nutrient levels and exchanging aquatic invertebrates when doing so. *See* AR
5 2050 at 2060 (Figure 9, Trophic Structure of Redwood City Salt Ponds).

6 **B. The EPA Decision Making Process**

7 1. Cargill's Requests for Jurisdictional Determination

8 In November 2009, Cargill requested that the San Francisco local District of the Army Corps
9 prepare a preliminary jurisdictional determination under the Rivers and Harbors Act, 33 U.S.C. § 403
10 ("RHA") and CWA for the area in and adjacent to the Site. AR 1 at 4 (Final JD). Cargill made that
11 request in conjunction with a permit application filed with Redwood City for a proposed mixed use,
12 high density urban development project at the Site. AR 16 at 17 (Cargill's JD Request). As part of
13 its request, Cargill prepared and submitted to the Army Corps maps reflecting its assumption that
14 portions of the Site were jurisdictional under the CWA. *See* AR 385–479 (Cargill Preliminary JD
15 Submittal Package).

16 In 2010, pursuant to that request, the Army Corps issued a preliminary jurisdictional
17 determination stating that wetlands and other waters on the site may be jurisdictional under the CWA.
18 AR 354 (ACOE Letter to Cargill, Preliminary Jurisdictional Determination, April 14, 2010). The
19 Army Corps determined that jurisdiction under the CWA may be present within the boundaries of the
20 1,478-acre area under review. *Id.* The Army Corps' determination was based on the current
21 conditions of the Site as verified through a visit by staff on December 17, 2009. *Id.*

22 On May 4, 2012, Cargill withdrew its urban development project permit application to
23 Redwood City. AR 381 (Cargill Letter to Mayor of Redwood City, May 4, 2012). Then, on May 30,
24 2012, Cargill requested that the Army Corps and EPA prepare a formal jurisdictional determination
25 for the site under section 404 of the CWA and section 10 of the RHA. AR 27 (Approved JD
26 Submission, May 30, 2012). Cargill's request for an approved jurisdictional determination asked
27 EPA to exercise its "special case" authority under the MOA. AR 16 at 17 (Cargill Approved JD
28 Request Letter). Upon receipt of that request, the Army Corps and EPA agreed to collaborate, with

1 EPA providing “technical support” for the decision. AR 1055 (Email from Jason Brush, October 30,
2 2012).

3 2. EPA’s Assumption of Authority over the Jurisdictional Determination

4 On March 18, 2015, the Army Corps prepared a memorandum and email to EPA indicating
5 that it intended to determine that the Site was not jurisdictional under the CWA, reversing course
6 from its response five years earlier. AR 1 at 5 (Final JD); *see also* AR 488 at 489 (ACOE Email to
7 EPA March 18, 2015). The Army Corps reached out to EPA to give the agency an opportunity to
8 invoke its “special case” authority under the MOA with regard to section 404 CWA jurisdiction over
9 the Site. *Id.* at 489–90. Upon receiving the Army Corps’ intent to finalize its negative jurisdictional
10 determination, EPA designated the Site as a “special case.” AR 1 at 5 (Final JD).

11 The Army Corps’ jurisdictional determination under the RHA is not at issue in this litigation.
12 On January 13, 2017, EPA’s General Counsel Avi Garbow sent a Memorandum containing EPA
13 Office of the General Counsel’s “legal analysis and rebuttal” of the ACOE’s finding. AR 2038. The
14 Memorandum concluded that “the new jurisdictional test” ACOE used in reaching its outcome “is
15 inconsistent with the law, practice, and fundamental goals of the CWA and is not a correct
16 framework to use in construing the term ‘navigable waters.’” AR 2038 at 2047.

17 3. EPA Region 9 Prepares a JD Concluding that 1,270 Acres of the Site are
18 Jurisdictional “Waters of the United States” Under the Clean Water Act

19 Having designated the Site as a “special case,” EPA Region 9 prepared a jurisdictional
20 determination which concluded that 1,270 acres of the Site are jurisdictional “waters of the United
21 States” under the Clean Water Act, while the remaining 95 acres of levees, building pads, and other
22 features were converted to non-jurisdictional “fast land” prior to the Act’s enactment. Region 9 JD at
23 65.⁴ The Region 9 JD consisted of 66-pages of analysis as well as appendices consisting of two
24 separate subcontractor reports. Region 9 JD at 1–3; *see also* AR 577–638 (SFEI Technical Memo);
25 AR 3663–3694 (Towill Report). For example, included were summaries of extensive Site

26 _____
27 ⁴ The Region 9 JD is attached to the Baykeeper Complaint as Exhibit A. Dkt. #1 at 32-98. It is also
28 submitted with Plaintiffs’ accompanying motion to complete or supplement the record. *See*
Declaration of James Saul in Support of Motion to Complete or Supplement the Administrative
Record, Exhibit 1.

1 observations documenting discharges from the Site to First Slough and leakage from the levees into
2 the Bay. Region 9 JD at 45. Also included was discussion of the water characteristics at the Site and
3 their significant effects on the Bay. *Id.* at 46–47. The results of extensive observation of waterbirds,
4 mammals, fish and endangered species at the Site were also summarized. *Id.* at 52–64; *see also* AR
5 2050 at 2061, 2062 (Photos of fox and snowy plover at Site); *see also* AR 2081, 2100, 2164 (data
6 compilations of birds observed by pond).

7 Region 9 concluded that 1,270 acres of the Site were jurisdictional “waters of the United
8 States” for the following, independent reasons: (1) the tidal channels within the salt ponds were part
9 of the traditionally navigable waters of the San Francisco Bay; (2) the salt ponds are navigable
10 currently and can be used in interstate or foreign commerce; (3) the salt ponds are impoundments of
11 water otherwise defined as “waters of the United States;” and (4) the salt ponds have a significant
12 nexus to the traditionally navigable waters of the San Francisco Bay. Region 9 JD at 1.

13 4. The Trump Administration EPA’s Final JD Conflicts with Region 9’s Findings

14 The advent of the Trump administration in 2017 resulted in leadership change at the EPA, yet
15 for a time, nothing further happened with the affirmative JD Region 9 had prepared in November
16 2016. However, on March 1, 2019, EPA Administrator Andrew Wheeler issued a new 13-page JD
17 that, in a reverse of its prior findings and even the Army Corps’ 2010 preliminary jurisdictional
18 submittal, found that none of the Site included waters of the United States because the Site was
19 entirely transformed into fast land before passage of the CWA. AR 1 at 3–15 (Final JD). The Final
20 JD omitted any discussion of the Region 9 JD and EPA’s earlier observations of conditions at the
21 Site, including interconnections with the Bay and wildlife. It also omitted any analysis of whether
22 the Site included regulatory waters of the United States. And it ignored the two conclusions in the
23 two subcontractor reports from SFEI and Towill, Inc. which had accompanied the Region 9 JD.

24 **IV. STANDING**

25 **A. California has Standing to Bring this Action**

26 Article III standing requires that a “plaintiff must have (1) suffered an injury in fact, (2) that is
27 fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a
28 favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). “To establish

1 injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’
2 that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Id.* at
3 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

4 As the U.S. Supreme Court has found, “States are not normal litigants for the purposes of
5 invoking federal jurisdiction” and are entitled to “special solicitude” that must be considered when
6 establishing standing. *Massachusetts v. U.S. Env’tl. Prot. Agency*, 549 U.S. 497, 518–20 (2007). A
7 State’s “well-founded desire to preserve its sovereign territory” supports standing in cases
8 implicating environmental harms. *Id.* at 519; *see also California v. EPA*, 385 F. Supp. 3d 903, 909–
9 11 (N.D. Cal. 2019) (applying *Massachusetts v. EPA* to standing analysis for state plaintiffs). That a
10 state’s own territory is the “territory alleged to be affected” by the challenged action “reinforces the
11 conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of
12 federal judicial power.” *Massachusetts v. EPA*, 549 U.S. at 519.

13 Here, Defendants only challenge California’s standing under the first prong of the standing
14 test, arguing that California is not injured by the Final JD because “at least one” of its state agencies,
15 the San Francisco Bay Conservation and Development Commission (“BCDC”), has authority under
16 the McAteer-Petris Act, Cal. Govt. Code § 66600 *et seq.*, to regulate activities on the Site. Dkt. # 56
17 EPA Mot. at 19–20. This assertion is baseless. While the McAteer-Petris Act provides BCDC with
18 jurisdiction over the Site, the protections applicable under the McAteer-Petris Act do not replace the
19 protections under the CWA. Moreover, Defendants simply ignore the many ways in which
20 California’s sovereign territory and its water resources, including the San Francisco Bay, are injured
21 by EPA’s decision.

22 First, while the McAteer-Petris Act authorizes BCDC to regulate development projects in San
23 Francisco Bay and along the shoreline, it is not equivalent to the CWA. Declaration of Marc A.
24 Zeppetello in Support of Plaintiffs’ Combined Opposition to and Cross-Motion for Summary
25 Judgment (“Zeppetello Decl.”), ¶¶ 3–6, submitted herewith. In particular, the McAteer-Petris Act is
26 not primarily designed or intended to protect water quality or limit the discharge of pollutants to State
27 waters. *Id.*, ¶ 6. Although BCDC has authority to issue a permit for development of the Site
28 pursuant to its authority under California Government Code Section 66610(c), any such permit,

1 unlike a BCDC permit for a filling project in the Bay, will not be conditioned on the requirement that
2 the project applicant must demonstrate that its proposed use is water-oriented or that there is no
3 upland alternative. *See Id.*, ¶¶ 7, 9; Cal. Gov. Code § 66605(a)–(b). Nor is BCDC authorized to
4 apply the environmentally protective requirements of the CWA in evaluating such a permit. *See* 33
5 U.S.C. § 1344(c) (discharge may be prohibited where it “will have an unacceptable adverse effect on
6 municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas),
7 wildlife, or recreational areas”). Instead, BCDC’s focus in issuing a permit related to development of
8 the Site would be to consider whether the project would provide maximum feasible public access and
9 whether sufficient areas of open water would be retained. *See Zeppetello Decl.*, ¶ 8; Cal. Gov. Code
10 § 66602.1. Thus, BCDC’s authority to issue permits related to the Site does not supplant the
11 protections of the CWA and does not undermine the injury to California from EPA’s Final JD.

12 Indeed, contrary to Defendants’ contentions, California has standing because the Final JD
13 directly harms its interests. Because the Final JD exempts the Site from the requirement to obtain a
14 Section 404 permit, it deprives California of the ability to conduct review of dredge and fill activities
15 under the Section 401 certification process, prevent the issuance of a Section 404 permit, as
16 appropriate, or impose conditions consistent with state law to ensure the state’s water resources are
17 protected. *Mumley Decl.*, ¶¶ 4–5, 17; *Zeppetello Decl.*, ¶ 10. As a result, and as Cargill
18 acknowledges in its intervention motion, the practical effect of the Final JD is to make it easier and
19 more likely to develop the Site. *See Dkt. #36* at 8 (“the jurisdictional status of the [Site] directly
20 affects how Saltworks may be permitted to use the property in the future”).

21 By increasing the likelihood that the Site will be developed, EPA’s decision injures California
22 in several ways, including by (1) harming California’s interests in protecting and restoring the water
23 quality in San Francisco Bay, *Mumley Decl.*, ¶¶ 16–19; (2) undermining its efforts to restore
24 wetlands, *id.*, ¶¶ 9–10, 13, 21; (3) exacerbating risks of flooding and sea level rise, *id.*, ¶ 20; and (4)
25 increasing development pressure on similar parcels and compounding the risk of losing additional
26 wetland resources critical to making the Bay more resilient to climate change, *id.*, ¶¶ 22–23.

27 Moreover, even if state agencies had authority to regulate activities at the Site, the increased
28 regulatory burden on California to undertake such efforts provides a further basis for standing. *See*

1 *California v. Azar*, 911 F.3d 558, 571–72 (9th Cir. 2018) (California had standing due to “economic
2 harm” to the state to fill federal gap in covering contraceptive care); *Air All. Houston v. EPA*, 906
3 F.3d 1049, 1059–60 (D.C. Cir. 2018) (“[m]onetary expenditures to mitigate and recover from harms
4 that could have been prevented absent the [federal rule] are precisely the kind of ‘pocketbook’ injury
5 that is incurred by the state itself”); *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015) (impact
6 on State resources provides basis for standing). These economic harms include increased
7 administrative burdens and enforcement costs. Mumley Decl., ¶¶ 16, 18–19.

8 Finally, Defendants have not challenged the standing of the remaining Plaintiffs in these
9 consolidated cases, essentially admitting that all Plaintiffs have standing. “[T]he presence of one
10 party with standing is sufficient to satisfy Article III’s case-or-controversy requirement” for other
11 plaintiffs. See *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006);
12 *Brown v. City of Los Angeles*, 521 F.3d 1238, 1240 n.1 (9th Cir. 2008) (“the presence in a suit of
13 even one party with standing suffices to make a claim justiciable”); *California v. EPA*, 385 F. Supp.
14 3d at 909 (“Because the Court finds the State Plaintiffs have standing, it need not evaluate whether
15 [environmental plaintiff] has standing”). Thus, Defendants’ standing arguments provide no basis for
16 dismissal of California’s claims.

17 **B. Each Nonprofit Plaintiff Has Standing**

18 An organization has standing to sue on behalf of its members if “(a) its members would
19 otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to
20 the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the
21 participation of individual members in the lawsuit.” *Ecological Rights Found. v. Pac. Lumber Co.*,
22 230 F.3d 1141, 1147 (9th Cir. 2000) (quoting *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S.
23 333, 343 (1977)). An organization’s members, in turn, have standing when:

- 24 (1) [they have] suffered an “injury in fact” that is (a) concrete and
25 particularized and (b) actual or imminent, not conjectural or
26 hypothetical; (2) the injury is fairly traceable to the challenged action of
the defendant; and (3) it is likely, as opposed to merely speculative, that
the injury will be redressed by a favorable decision.

27 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

1 Individual members suffer a cognizable injury in fact if they “use the affected area and are
2 persons for whom the aesthetic and recreational values of the area will be lessened by the challenged
3 activity.” *Id.* at 183. The injury prong does not require a showing of actual environmental
4 degradation, *Ecological Rights Found.*, 230 F.3d at 1141, and Plaintiffs here need only show that the
5 government’s abdication of its Clean Water Act authority will pave the way for future degradation of
6 the affected waters. *See, e.g., Sound Action v. U.S. Army Corps of Engineers*, No. C18-0733JLR,
7 2019 WL 446614, at *12 (W.D. Wash. Feb. 5, 2019) (Plaintiff’s members have standing to challenge
8 the Army Corps’ decisions regarding its scope of CWA jurisdiction in Puget Sound); *Deerfield*
9 *Plantation Phase II-B Prop. Owners Ass’n, Inc. v. U.S. Army Corps of Engineers*, 501 F. App’x 268,
10 275 (4th Cir. 2012) (plaintiffs satisfied Article III’s causation requirement where their aesthetic
11 injuries would result from development facilitated by the Army Corps’s negative jurisdictional
12 determination).

13 Each of the Plaintiff organizations has standing. The interests they seek to protect by this
14 action—the water quality and ecological integrity of San Francisco Bay and the protection and
15 restoration of the Bay’s wetlands and marshes, including those located at and near the Salt Ponds
16 Site—are germane to each organization’s purpose. *See* Sejal Choksi-Chugh Decl. ¶¶ 7, 8, 9; Gail
17 Raabe Decl. ¶¶ 8–9; Matthew Leddy Decl. ¶¶ 8–9; Bryan Beck Decl. ¶ 8; David Lewis Decl. ¶ 6;
18 Robert Most Decl. ¶ 7. The organizations’ claims do not require the participation of individual
19 members.

20 Each organization has one or more members whose aesthetic and recreational interests in the
21 Salt Ponds site will be lessened by the destruction or filling of the Salt Ponds. Members of each
22 organization have been residents of the area for many years; use the area for recreational activities
23 such as canoeing, bicycling, walking and fishing, observe and photograph birds and other wildlife for
24 recreational and conservation purposes, and/or conduct educational programs, tours and activities in
25 the area, among many other things. *See* Raabe Decl. ¶¶ 10–12; Leddy Decl. ¶¶ 10–14; Lewis Decl.
26 ¶¶ 5–7; Beck Decl. ¶¶ 6–8; Most Decl. ¶¶ 8–14. These members have suffered injury as a direct result
27 of the Final JD. *See* Raabe Decl. ¶¶ 13–15, 18–21, 24; Leddy Decl. ¶¶ 16–18, 22; Lewis Decl. ¶¶ 9–
28 10; Beck Decl. ¶¶ 8–10; Most Decl. ¶¶ 16–18, 20; Choksi-Chugh Decl. ¶¶ 19–20. Those cognizable

1 injuries are caused in part by EPA’s Final JD clearing the way for development at the Site. Plaintiffs
2 thus satisfy Article III’s jurisdictional requirements.

3 **V. ARGUMENT**

4 **A. Summary of Argument**

5 The Final JD violates the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (“APA”)
6 because it is contrary to the law, unsupported by facts in the Administrative Record, inconsistent with
7 prior EPA determinations and ignores EPA’s own information and technical expertise regarding the
8 Site, and fails to undertake any legal analysis of regulable waters of the United States.

9 First, EPA’s conclusion that the entire Site is “fast land” and has been “fast land” since before
10 1972 is legally incorrect. EPA misinterpreted the fast land doctrine set out by the Ninth Circuit in
11 *United States v. Milner*, 583 F.3d 1174, 1194–95 (9th Cir. 2009) and *Leslie Salt Co. v. Froehlke*, 578
12 F.2d 742, 754–55 (9th Cir. 1978) by concluding the separation of the Site from San Francisco Bay by
13 dykes and levees converted it to fast land. That is not the law. To the contrary, navigable waters are
14 “waters that were or had been navigable in fact or which could reasonably be so made.” *Solid Waste*
15 *Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001). And the mere
16 separation of lands by man-made structures does not eliminate CWA jurisdiction. *See Milner*, 583
17 F.3d at 1195, *Froehlke*, 578 F.2d at 745.

18 Second, the facts in the Administrative Record regarding the Site contradict EPA’s
19 determination that it was filled, dry land prior to 1972. “Dry land” is generally referred to as land
20 above the high water mark or high tide line. *See Golden Gate Audubon Soc., Inc. v. U.S. Army Corps*
21 *of Eng’rs*, 796 F. Supp. 1306, 1309 (N.D. Cal. 1992). Indeed, those facts compel the conclusion that
22 the Site was not filled or converted from its historical tidal marsh status to upland at any point prior to
23 the issuance of the Final JD. The Site was not excavated or created from dry land. It was historically
24 subject to tidal influence, and would be again without the man-made impoundments at the Site.
25 Further, the Site remains below the ordinary high water mark.

26 Third, the Final JD contradicts the more thorough, well-reasoned, and factually supported
27 conclusions of Region 9. The Region 9 JD relied on technical expertise, two consultant expert
28 analyses of the Site and its history, considered the extensive information and advocacy presented by

1 Cargill, and applied the fast land doctrine and regulatory definition of waters of the United States to
2 conclude the Site falls within the CWA’s jurisdiction.

3 The Final JD ignores those findings. The Final JD also fails to explain EPA’s reversal in
4 application of the fast land doctrine and analysis of the waters at the Site. This makes it arbitrary and
5 capricious. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*,
6 463 U.S. 29, 43 (1983) (“*State Farm*”); *WildEarth Guardians v. Provencio*, 923 F.3d 655, 666 (9th
7 Cir. 2019); *Ctr. for Biological Diversity v. Zinke*, 868 F.3d 1054, 1061 (9th Cir. 2017) (requiring
8 review of “the change of course” necessary to “ensure it is based on new evidence or . . . reasoned
9 analysis”); *Desert Survivors v. U.S. Dep’t of Interior*, 321 F. Supp. 3d 1011, 1044 (N.D. Cal. 2018).

10 Fourth, the Final JD does not undertake any analysis of the regulatory and judicial definitions
11 of “waters of the United States.” If the Final JD had, it would have concluded, like Region 9 did, that
12 the Site’s waters meet the regulatory requirements. The term navigable waters must be read broadly
13 under the Act. *United States v. Riverside Bayview Homes*, 474 U.S. at 133. The Site contains
14 traditionally navigable waters, is an impoundment of waters of the United States, is adjacent to the
15 San Francisco Bay and other waters of the United States, and has a significant nexus to waters of the
16 United States. *See, e.g., Rapanos*, 547 U.S. 715.

17 In sum, after meeting with Cargill in the late summer of 2018, *see* AR 2868 and 2869
18 (Calendar Appointments), and without any new information not before Region 9, EPA determined
19 the Site was not jurisdictional. This reversal in position required a rationale, and EPA improperly
20 relied on the fast land doctrine to reach Cargill’s desired result. But the fast land doctrine does not
21 apply and EPA presents no explanation for its election to ignore Region 9’s expertise, findings, and
22 analysis. The Site contains waters of the United States and the Final JD should be vacated because it
23 violated the APA.

24 **B. Standard of Review**

25 Under the APA, a court must “hold unlawful and set aside agency actions, findings, and
26 conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in
27 accordance with law.” 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious under the
28 APA where the agency (i) has relied on factors which Congress has not intended it to consider; (ii)

1 entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its
2 decision that runs counter to the evidence before the agency; or (iv) is so implausible that it could not
3 be ascribed to a difference of view or the product of agency expertise. *State Farm*, 463 U.S. at 43.

4 The arbitrary and capricious standard does not shield agency action from “thorough, probing,
5 in-depth review” of those actions. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415
6 (1971). While the standard of review is “narrow,” *State Farm*, 423 U.S. at 43, “a reviewing court
7 must conduct a searching and careful inquiry into the facts.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of*
8 *Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).

9 EPA incorrectly contends that the Court must apply a “deferential” standard of review,
10 suggesting that heightened deference is warranted here because its decision involved the “agency’s
11 technical analysis, judgment, and scientific determinations on matters within its expertise.” EPA Br.
12 at 20–21.⁵ While courts are deferential when reviewing an agency’s technical analysis, *NRDC, Inc.*
13 *v. Pritzker*, 828 F.3d 1125, 1139 (9th Cir. 2016), they may not “rubber-stamp” administrative
14 decisions that “frustrate the congressional policy underlying a statute.” *Ocean Advocates v. U.S.*
15 *Army Corps of Eng’rs*, 402 F.2d 846, 859 (9th Cir. 2005). The Final JD should not be given
16 deference because it frustrates the congressional policy underlying the CWA “to restore and maintain
17 the chemical, physical, and biological integrity of the Nation’s waters,” and runs counter to Region
18 9’s more thoughtful, considered, and legally sound conclusion that the waters are jurisdictional and
19 protected under the CWA.

20 The deference owed to an agency’s decision is limited by “the thoroughness evident in its
21 consideration, the validity of its reasoning, its consistency with early pronouncements, and all those
22 factors which give it power to persuade.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). When
23 considering how much deference to afford an agency decision, “courts have looked to the degree of
24 the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the
25 agency’s position.” *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). Site-specific agency

26 ⁵ In support, EPA improperly cites to the syllabus of the Supreme Court’s opinion in *U.S. Army*
27 *Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), a case involving a challenge to a CWA
28 jurisdictional determination. EPA Br. at 21 (citing *Hawkes*, 136 S. Ct. at 1810). That syllabus, of
course, is not a part of the Court’s opinion and carries no weight. See *United States v. Detroit Timber*
& Lumber Co., 200 U.S. 321, 337 (1906).

1 decisions issued without notice and comment, like the Final JD at issue here, do not warrant any
2 significant deference. *Id.* at 233.

3 To comply with the APA, EPA was required to act in accordance with regulatory
4 requirements, including the Clean Water Rule. *See* 5 U.S.C. § 706(2)(A). EPA failed to do so.
5 Moreover, it is incumbent upon EPA to “articulate a satisfactory explanation for its action, including
6 a ‘rational connection between the facts found and the choice made.’” *Ctr. for Biological Diversity v.*
7 *Nat’l Highway Safety Admin.*, 538 F.3d 1172, 1193 (9th Cir. 2008). Faulty caselaw application can
8 hardly suffice as a rational connection between the facts at hand and the Agency’s conclusion. EPA
9 offers no explanation for its departure from the Region 9 JD and wishes to portray that the document
10 was not before the decisionmaker by excluding it from the administrative record. Ultimately, EPA’s
11 decision should be set aside and held unlawful because it is arbitrary, capricious, and not in
12 accordance with the law under any level of review and deference.

13 C. The Site Consists of Waters of the United States

14 Because EPA erroneously concluded that the entire Site was “fast land,” it failed to undertake
15 a jurisdictional analysis to determine if waters present at the Site fall within the definition of “waters
16 of the United States.” Had it done so, the record is clear that the majority of the Site would be found
17 jurisdictional under CWA jurisprudence and the then-controlling Clean Water Rule. *See* 40 C.F.R. §
18 230.3(o) (2015–2019).

19 1. The Site Contains Traditionally Navigable Waters

20 In interpreting the scope of CWA jurisdiction, courts have long recognized the doctrine of
21 “indelible navigability,” which holds that once a body of water is deemed to be navigable, it remains
22 navigable as a matter of law, in perpetuity. *See, e.g., Milner*, 583 F.3d at 1195 n.15. This doctrine
23 derives from the Commerce Clause and, prior to passage of the CWA, had been applied many times
24 to find that construction of man-made obstacles does not divest Congress of its authority to regulate
25 waterways that are no longer navigable-in-fact. *See, e.g., Appalachian Electric Power Co.*, 311 U.S.
26 377, 406 (1940) (“When once found to be navigable, a waterway remains so”); *United States v.*
27 *Moses*, 496 F.3d 984, 989 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2963 (2008) (“we do not see how a
28 mere man-made diversion, however long ago undertaken, could change Teton Creek from a water of

1 the United States into something else”); *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d
2 1210, 1218 (D. Or. 2009) (holding that man-made berms which severed historic connection between
3 wetlands and creek “cannot eliminate the CWA’s jurisdiction over a water of the United States.”).
4 The Clean Water Rule, and all prior and subsequent federal regulatory definitions of “waters of the
5 United States,” incorporate this concept by covering “[a]ll waters which are currently used, were used
6 in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which
7 are subject to the ebb and flow of the tide.” 40 C.F.R. § 230.3(o)(1)(i); *see* 80 Fed. Reg. at 37,074.

8 Here, there is no dispute that much of the Site was part of the traditionally navigable waters of
9 San Francisco Bay. *See* Baykeeper Compl., ¶ 64; EPA Baykeeper Answer, ¶ 64; AR 1 at 5 (Final
10 JD); AR 577 at 611 (SFEI Technical Memo); Region 9 JD at 7. Prior to levee construction, the Site
11 had been marshland subject to inundation during periods of high tide, and contained an extensive and
12 dense network of tidal sloughs subject to regular tidal action. Baykeeper Compl., ¶ 64; EPA
13 Baykeeper Answer, ¶ 64; Region 9 JD at 20. These sloughs were of sufficient size and depth to be
14 navigated by small vessels. Baykeeper Compl., ¶ 82; EPA Baykeeper Answer, ¶ 82; Region 9 JD at
15 26–30.

16 Moreover, the salt ponds at the Site in their current condition have been shown to be
17 navigable in fact, as demonstrated by the use of a floating, clamshell dredge to maintain the levees.
18 Baykeeper Compl., ¶¶ 71, 74, 83; EPA Baykeeper Answer, ¶¶ 71, 74, 83; AR 11, 14; Region 9 JD at
19 30–32. This dredge, known as “The Mallard,” accesses the ponds via an excavated tidal channel at
20 two pre-approved dredge lock locations adjacent to Bittern Ponds 9 and 9A, and navigates through
21 the ponded waters to reach the edges of the dikes for repairs. *Id.* In addition, the salt ponds at the
22 Site may reasonably be improved to create useable navigable connections to the adjacent waters of
23 San Francisco Bay, as demonstrated by existing salt pond restoration projects and the presence of
24 commercial recreational watercraft outfitters in the region. Region 9 JD at 32, 36.

25 2. The Site is an Impoundment of Waters of the United States

26 While EPA relies on the fact that the Site was separated from Bay waters to support a lack of
27 jurisdiction, the Clean Water Rule specifically defined “waters of the United States” to include “[a]ll
28

1 impoundments of waters otherwise identified as waters of the United States under this section.” 40
2 C.F.R. § 230.3(o)(1)(iv) (2015–2019).⁶

3 The salt ponds at the Site are impoundments of waters from the San Francisco Bay, which is
4 a traditionally navigable water. San Francisco Bay water has been and is currently used to fill the
5 ponds for salt production. Baykeeper Compl., ¶¶ 72–74, 76; EPA Baykeeper Answer, ¶¶ 72–74, 76;
6 State Compl., ¶ 49; EPA State Answer, ¶ 49; AR 1 at 11 (Final JD); AR 1107 at 1109 (Cargill Letter
7 to ACOE, February 28, 2002); AR 6157 at 6158–59 (1999 Cargill Maintenance Report); AR 6169 at
8 6170 (2000 Cargill Maintenance Report). The configuration and use of the salt ponds for industrial
9 purposes does not preclude them from being waters of the United States. *See S.D. Warren Co. v.*
10 *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) (“[N]or can we agree that one can
11 denationalize national waters by exerting private control over them.”); *U.S. v. Moses*, 496 F.3d at 989
12 (“a mere man-made diversion, however long ago undertaken, could [not] change [a waterbody] from
13 a water of the United States into something else”).

14 3. The Site is Adjacent to Waters of the United States

15 By their very nature, impoundments of jurisdictional waters often meet the separate definition
16 of “adjacent waters,” since they are typically bordering or contiguous. *See* 80 Fed. Reg. at 37,075.
17 Under the Clean Water Rule, “waters of the United States” included “[a]ll waters adjacent to a water
18 identified in paragraphs (o)(1)(i) through (v) of this section, including wetlands, ponds, lakes,
19 oxbows, impoundments, and similar waters.” 40 C.F.R. § 230.3(o)(1)(vi) (2015–2019).⁷ Here,
20 almost half of the Site is bordered by navigable tributaries of the San Francisco Bay, including
21 Redwood Creek, First Slough, Westpoint Slough, and Flood Slough. Baykeeper Compl., ¶ 64; EPA
22 Baykeeper Answer, ¶ 64; AR 577 at 607 (SFEI Technical Memo).

23
24
25 ⁶ EPA’s new Navigable Waters Protection Rule, once finalized, will also extend jurisdiction over
26 impoundments that “contribute surface water flow” to a traditionally navigable water in a typical year
either directly or indirectly. EPA, Navigable Waters Protection Rule: Definition of ‘Waters of the
United States’ (pre-publication version) at 7.

27 ⁷ “Adjacent” was separately defined to mean “bordering, contiguous, or neighboring a water
28 identified in paragraphs (o)(1)(i) through (v) of this section, including waters separated by
constructed dikes or barriers, natural river berms, beach dunes, and the like.” 40 C.F.R. §
230.3(o)(3)(i) (2015–2019).

1 In addition, the Bayfront Canal and lowermost Atherton Channel border the south property
2 boundary and are hydrologically connected to Flood Slough through leaky tide gates that allow tidal
3 waters to enter and exit the flood channel twice daily. AR 2069 at 2080 (R.A. Leidy, Field Notes,
4 January 21, 2016); AR 3695 at 3709 (September 30, 2015 Site Visit, Photos 27, 28); Region 9 JD at
5 44. Also directly surrounding the Site are federal and state ecological preserves and other protected
6 lands that contain waters of the United States, including the Ravenswood Open Space Preserve and
7 the Palo Alto Baylands Preserve, which are part of the Don Edwards National Wildlife Refuge. State
8 Compl., ¶ 50; EPA State Answer, ¶ 50. Consequently, the Site is jurisdictional because it is adjacent
9 to waters of the United States.

10 4. The Site Has a Significant Nexus to Waters of the United States

11 The Site also has a significant nexus to the traditionally navigable waters of the San Francisco
12 Bay. As stated by Justice Kennedy in *Rapanos*, waters may possess a significant nexus if “either
13 alone or in combination with similarly situated lands in the region, [the waters] significantly affect
14 the chemical, physical, and biological integrity of other covered waters more readily understood as
15 ‘navigable.’” *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment). The Clean Water
16 Rule authorized “case specific” determinations of significant nexus to establish that particular waters
17 that do not fit any other prong of the regulatory definition, such as waters “within the 100-year
18 floodplain” of a traditional navigable water or “within 4,000 feet of the high tide line or the ordinary
19 high water mark” of a traditional navigable water, are nonetheless “waters of the United States.” *See*
20 80 Fed. Reg. at 37,086–87; 40 C.F.R. § 230.3(o)(1)(viii)(2015–19).⁸

21 “Significant nexus” was defined in the Clean Water Rule to mean a water that “significantly
22 affects the chemical, physical, or biological integrity” of a water of the United States. *Id.* §
23 230.3(o)(3)(v) (2015–2019). Functions considered for the purposes of determining a significant
24 nexus are “sediment trapping;” “nutrient recycling;” “pollutant trapping, transformation, filtering, and
25 transport;” “retention and attenuation of floodwaters;” “runoff storage;” “contribution of flow;”
26 “export of organic matter;” “export of food resources;” and, “provision of life cycle dependent

27 ⁸ EPA’s new regulatory definition, once finalized, will eliminate the “significant nexus” approach to
28 CWA jurisdiction. *See* EPA, Navigable Waters Protection Rule: Definition of ‘Waters of the United
States’ (pre-publication version) at 87.

1 aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area)” for
2 species located in traditional navigable waters. *Id.* A waterbody does not need to perform all of
3 these functions to have a significant nexus.

4 “A water has a significant nexus when any single function or combination of functions
5 performed by the water, alone or together with similarly situated waters in the region, contributes
6 significantly to the chemical, physical, or biological integrity of the nearest traditional navigable
7 water.” 80 Fed. Reg. at 37,093; *see United States v. Cundiff*, 555 F.3d 200, 211 (6th Cir. 2009), *cert.*
8 *denied*, 558 U.S. 818 (2009) (wetlands provide water storage, habitat, and filter acid runoff and
9 sediment).

10 Here, the record supports a finding that the Site has a significant nexus to the waters of San
11 Francisco Bay and its tributaries. First, the Site is both “within the 100-year floodplain” and “within
12 4,000 feet of the high tide line or ordinary high water mark” of San Francisco Bay. AR 577 at 592–
13 93 (SFEI Technical Memo); *see also Id.* at 612; AR 2593 at 2618 (Baye Analysis); Region 9 JD at
14 32, 37–39, 51. The close proximity of the Site to waters of San Francisco Bay is a major reason the
15 salt pond waters have significant physical, chemical and biological linkages to the Bay. Other
16 functions supporting a “significant nexus” finding for the Site include:

- 17 • The salt ponds at the Site also “have a substantial effect on many species of wildlife living in
18 or near the San Francisco Bay.” Baykeeper Compl., ¶ 77; EPA Baykeeper Answer, ¶ 77.
- 19 • The hydrologic nexus and flow between San Francisco Bay and the Site is demonstrated by
20 (1) imported brine which originated as seawater taken directly from San Francisco Bay; (2)
21 seawater exchange through tide gates, pipes and pumps adjacent to tidal First Slough (a part
22 of San Francisco Bay) for use in salt plant operational processes; and (3) periodic water
23 exchange between salt ponds and tidal First and Westpoint Sloughs during pond access by
24 The Mallard via dredge locks associated with levee maintenance and repair activities.
25 Baykeeper Compl., ¶¶ 71–73; EPA Baykeeper Answer, ¶¶ 71–73; AR 1107 at 1109 (Cargill
26 Request to ACOE for Disclaimer of Jurisdiction, 2002); AR 7157 at 6158–59 (Cargill
27 Maintenance Report, August 1999); AR 6169 at 6170 (Cargill Maintenance Report,
28 September 2000); AR 1 at 8, 11 (Final JD); Region 9 JD at 11, 43.

- Hundreds of migratory and resident birds move between and utilize the Site and San Francisco Bay, often multiple times daily, for roosting, nesting, and feeding, causing nutrients and minerals to be exchanged between the Site and San Francisco Bay. Baykeeper Compl., ¶ 77; EPA Baykeeper Answer, ¶ 77; Region 9 JD at 42, 52.
- The federally endangered snowy plover has been observed regularly over the last decade roosting and feeding at the Site. AR 2050 at 2062 (Figure 11, Photo of federally endangered snowy plover); Region 9 JD at 35, 64.
- Fish and aquatic invertebrates from San Francisco Bay occasionally make it into the Site’s ditches through the tide gates, feed upon bacteria and algae at the Site, and are themselves foraged upon by birds on the Site. Baykeeper Compl., ¶¶ 77, 100; EPA Baykeeper Answer, ¶¶ 77, 100; AR 2069 at 2080 (R.A. Leidy, Field Notes, January 21, 2016); AR 2050 at 2060 (Figure 9, Trophic Structure of Redwood City Salt Ponds); Region 9 JD at 47–50.
- Various species of mammals, including foxes and coyotes, regularly frequent the Site and its levees for hunting. Baykeeper Compl., ¶¶ 77, 100; EPA Baykeeper Answer, ¶¶ 77, 100; AR 2050 at 2061 (Photo of foxes, February 2, 2013); *see also* AR 2081, 2100, 2164 (Data compilations of birds observed by pond); Region 9 JD at 62–63.
- The open waters of the Site sequester and transform nutrients and chemical contaminants that could adversely impact water quality in the San Francisco Bay. Baykeeper Compl., ¶ 78; EPA Baykeeper Answer, ¶ 78; Region 9 JD at 49–50.
- The Site helps to protect adjacent low-lying areas from tidal flooding. AR 3528 at 3532 (BCDC Report, October 2005); Region 9 JD at 51.

Consequently, the Site has a significant nexus to the traditionally navigable waters of San Francisco Bay and falls within the “waters of the United States” definition.

D. EPA’s Reliance on the Fast Land Doctrine was Contrary to Law

There is no merit to EPA’s finding that the entire Site “does not include ‘waters of the United States’ because the site was transformed into fast land before the passage of the CWA.” AR 1 at 3, 13 (Final JD); Dkt. #56, EPA Mot. at 24–28. While Plaintiffs do not dispute that former waters converted to fast land, *i.e.*, “dry, solid upland,” before enactment of the CWA are not jurisdictional,

1 see Dkt. #56, EPA Mot. at 25, the law does not support a conclusion that the Site is fast land; nor
2 does it justify EPA's complete failure to consider whether the Site contains "waters of the United
3 States."

4 Because any reasonable application of the legal and regulatory definition of waters of the
5 United States to the Site leads to the conclusion that the salt ponds are in fact waters, Cargill
6 primarily contended, and EPA ultimately agreed, that the Site was "fast land." EPA's desire to avoid
7 any analysis of whether the Site contained "waters of the United States," led to the misapplication of
8 the fast land doctrine, making EPA's decision contrary to law.

9 1. The Fast Land Doctrine

10 As an initial matter, the concept of fast land must be evaluated consistent with the broad
11 interpretation of "navigable waters" under the CWA. See *Milner*, 583 F.3d at 1194–95. The U.S.
12 Supreme Court and the Ninth Circuit have long endorsed a broad reading of the terms "navigable
13 waters" and "waters of the United States" for purposes of CWA jurisdiction. See *Riverside Bayview*
14 *Homes, Inc.*, 474 U.S. at 133 (in enacting the CWA, "Congress chose to define the waters covered by
15 the Act broadly"); *Froehlke*, 578 F.2d at 754–55 ("the term 'navigable waters' within the meaning of
16 the [CWA] is to be given the broadest possible constitutional interpretation under the Commerce
17 Clause").

18 2. EPA Incorrectly Interpreted and Applied *Milner* and *Froehlke* in Determining
19 the Site is Fast Land

20 While there is no statutory or regulatory definition of "fast land," this concept has been
21 discussed in two decisions by the Ninth Circuit: *Froehlke* and *Milner*. EPA claims to rely on both
22 *Froehlke* and *Milner*, see AR 1 at 13–15 (Final JD); Dkt. #56, EPA Mot. at 27. Yet EPA
23 misinterprets and misapplies these cases to reach a conclusion that is contrary to law.

24 First, and "most significant," EPA cites "the development of the site and its transformation
25 into upland and separation from Bay waters 70 years before passage of the CWA." AR 1 at 13–14;
26 Dkt. #56, EPA Mot. at 27. This rationale appears to rely heavily on the Ninth Circuit's statement in
27 *Milner* that "if land was dry upland at the time the CWA was enacted, it will not be considered part of
28

1 the waters of the United States unless the waters actually overtake the land . . .” *See* AR 1 at 14
2 (quoting *Milner*, 583 F.3d at 1195).

3 In *Milner*, the Ninth Circuit considered whether various “shore defense structures”—
4 including rip rap and bulkheads erected by waterfront homeowners on tidelands in Washington—
5 were subject to CWA jurisdiction. 583 F.3d at 1180–81. Citing to *Froehlke*, the Ninth Circuit stated
6 the general agreement that such jurisdiction “does not extend to property that was dry, solid upland as
7 of the date of the passage of the CWA,” since “[a]ny discharge on fast land would not actually be in
8 the waters of the United States.” *Id.* at 1195.

9 However, *Milner* does not support a non-jurisdiction finding based the Site’s separation from
10 San Francisco Bay prior to passage of the CWA. To the contrary, as the Ninth Circuit noted in that
11 decision:

12 [W]aters which were in the past navigable are still considered such, even
13 if they are no longer navigable in fact. *See United States v. Appalachian*
14 *Elec. Power Co.*, 311 U.S. 377, 408, 61 S. Ct. 291, 85 L.Ed. 243 (1940)
15 (“When once found to be navigable, a waterway remains so.”); 33
16 C.F.R. § 328.3(a)(1). We also reiterate [*Froehlke’s*] admonition that the
17 full extent of the Corps’ CWA jurisdiction over waters of the United
States “is in some instances not limited to the [mean high water] or the
[mean higher high water] line.” *Id.* at 742. For example, where there
are adjacent wetlands or intermittent streams, the Corps still has
jurisdiction, even though these areas are beyond the normal ebb and
flow of the tide.

18 *Id.* at 1195 n.15.

19 Even more relevant is *Froehlke*, where the Ninth Circuit considered the scope of the Army
20 Corps’ CWA jurisdiction over several thousand acres of salt ponds in San Mateo County. *Froehlke*,
21 578 F.2d at 745–46. As the court noted, “[i]n its natural condition, the property was marshland
22 subject to the ebb and flow of the tide.” *Id.* at 745. The site had been diked prior to the CWA’s
23 passage and “has not been subject to tidal action on a regular basis, although most of it is periodically
24 inundated by Bay waters for salt production.” *Id.* The Ninth Circuit found that salt ponds similarly
25 separated from San Francisco Bay were subject to CWA jurisdiction. *Id.* at 755 (“The water in
26 Leslie’s salt ponds, even though not subject to tidal action, comes from the San Francisco Bay. . . .
27 We see no reason to suggest that the United States may protect these waters from pollution while they
28 are outside of Leslie’s tide gates but may no longer do so once they have passed through these gates

1 into Leslie's ponds."). Thus, "the Corps's jurisdiction under the [CWA] extends *at least* to waters
2 which are no longer subject to tidal inundation because of Leslie's dikes without regard to the
3 location of historic tidal water lines in their unobstructed, natural state." *Id.* at 756 (emphasis added).
4 The Ninth Circuit also found it relevant that "activities within Leslie's salt ponds affect interstate
5 commerce, since Leslie is a major supplier of salt for industrial, agricultural, and domestic use in the
6 western United States." *Id.* at 755.⁹

7 3. The Salts Ponds were not Dry Lands and were not Filled prior to the Clean
8 Water Act

9 There is also no basis for EPA's characterization of the Site as dry, solid "upland." AR 1 at
10 13 (Final JD). While there is no statutory or regulatory definition of "upland," it has been referred to
11 as "dry land" that is above the high water mark or high tide line. *See Golden Gate Audubon Soc.,*
12 *Inc. v. U.S. Army Corps of Eng'rs*, 796 F. Supp. at 1309. The term "ordinary high water mark" is
13 defined as the "line on the shore established by the fluctuations of water and indicated by physical
14 characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character
15 of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate
16 means that consider the characteristics of the surrounding areas." 40 C.F.R. § 230.3(o)(3)(vi). The
17 term "high tide line" is "the line of intersection of the land with the water's surface at the maximum
18 height reached by a rising tide." *Id.* § 230.3(o)(3)(vii).

19 EPA asserts in its brief that "historically, and today, Cargill has been conducting site-wide
20 activities that, had they been conducted anew in tidal waters or tidal marsh after passage of the CWA,
21 would involve discharges of dredged or fill material." Dkt. #56, EPA Br. at 27. It then claims that
22 "[i]t is logical to regard such extensive filling as effecting a transformation of the aquatic system . . .
23 [t]hat is sufficient for purposes of the fast-land doctrine." *Id.* Yet EPA provides no evidence to show
24 that the site has been "filled" or transformed into dry, solid upland; to the extent that it is still "today"
25 conducting dredge and fill activities, it admits the opposite. Moreover, as noted above, the

26 ⁹ Following this authority, and as discussed in detail above, the Clean Water Rule explicitly defines
27 CWA jurisdiction to cover both "impoundments of waters otherwise identified as waters of the
28 United States," as well as "[a]ll waters adjacent to" waters of the United States, "including wetlands,
ponds, lakes, oxbows, *impoundments*, and similar waters." 40 C.F.R. § 230.3(o)(iv), (vi) (emphasis
added).

1 “transformation of the aquatic system” does not remove a once jurisdictional water from the reach of
2 the CWA. *Milner*, 583 F.3d at 1195 n.15.

3 The salt ponds at the Site were not excavated from dry lands, AR 1 at 11 (Final JD), were not
4 filled, and have remained below the high tide line and all of the ponds’ bottoms are below the
5 ordinary high water mark of San Francisco Bay. Baykeeper Compl., ¶¶ 75–76; EPA Baykeeper
6 Answer, ¶¶ 75–76; State Compl., ¶ 48; EPA State Answer, ¶ 48; AR 577 at 592–93, 612 (SFEI
7 Technical Memo); AR 2593 at 2618 (Baye Analysis); *see also* Region 9 JD at 37–39, 51. The Site is
8 regularly filled with process water and brine (i.e., hypersaline water) from the Newark site (which
9 itself originates as Bay water), is periodically inundated with water directly from San Francisco Bay,
10 and is filled by rainfall for at least three months of the year, and has identifiable high water marks.
11 Baykeeper Compl., ¶¶ 72–74, 76; EPA Baykeeper Answer, ¶¶ 72–74, 76; State Compl., ¶ 49; EPA
12 State Answer, ¶ 49; AR 1 at 11 (Final JD); AR 1107 at 1109 (February 28, 2002 Cargill Letter to
13 ACOE); AR 6157 at 6158–59 (1999 Cargill Maintenance Report); AR 6169 at 6170 (2000 Cargill
14 Maintenance Report); *see also* Region 9 JD at 11, 21, 41, 43.

15 There is also no dispute that the Site would be subject to tidal influence if the impounding
16 dikes were removed. Region 9 JD at 33–34; *see Solid Waste Agency of N. Cook Cty. v. U.S. Army*
17 *Corps of Eng’rs*, 531 U.S. at 172 (“[N]avigable waters” are “waters that were or had been navigable
18 in fact or which could reasonably be so made.”). Consequently, there is no basis for treating the
19 entire Site as dry, solid upland. *See United States v. Ciampitti*, 583 F. Supp. 483, 493–97 (D.N.J.
20 1984), *aff’d*, 772 F.2d 893 (3rd Cir. 1985), *cert. denied*, 467 U.S. 1014 (1986) (former tidal waters cut
21 off from tidal action and filled but which had converted to wetlands are jurisdictional because they
22 were not converted to dry lands).

23 In sum, there is no authority to support EPA’s characterization of the Site as “fast land.”
24 EPA’s legal conclusion and its failure to consider whether the Site contained “waters of the United
25 States” was contrary to the Clean Water Act, its implementing regulations, and case law, in violation
26 of the APA. 5 U.S.C. § 706(2)(A).

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28 ///

1 **E. The Final Jurisdictional Determination was Arbitrary and Capricious**

2 The Final JD was arbitrary and capricious in that it ignored or misinterpreted important
3 aspects of the Site’s permitting history and conditions, relied on facts that were irrelevant to the
4 determination of CWA jurisdiction, ignored the factual findings from the Region 9 JD, failed to
5 explain EPA’s reversal of position, and disregarded facts in the Administrative Record.

6 1. The Historical Permitting at the Site does not Support EPA’s Conclusion

7 EPA argues that the federal permitting at the Site supports the Final JD. *See* AR 1 at 7–10, 14
8 (Final JD). However, EPA provides no authority for the proposition that such actions support a
9 finding that the site is “fast land.” To the contrary, these actions highlight that the Site has long been
10 subject to federal regulation, including under the CWA. *See Id.* at 10 (“Starting in 1988, [the Army
11 Corps] issued permits under CWA Section 404 to Cargill for operations and maintenance covering
12 existing levees and infrastructure for Cargill’s facilities around the San Francisco Bay area.”).

13 2. EPA’s Characterization of the Site as “Industrial” is Incorrect and Immaterial
14 to whether the Site is Fast Land

15 To support its finding, EPA specifically relies on the “industrial” nature of salt production at
16 the Site. AR 1 at 13–15; *see* Dkt. #56, fMot. at 28 (while the Site has “pond-resembling features,
17 they are part and parcel of the salt production process.”). Yet EPA cites no authority for the
18 proposition that the industrial nature of a site precludes it from CWA jurisdiction. Indeed, this is a
19 position EPA has long and directly disavowed. *See* AR 2038 (EPA Office of the General Counsel
20 Memorandum, January 13, 2017); *see also* AR 2887 (1994 ACOE JD Memo re Cargill Napa Site at
21 1).

22 While EPA attempts to rely on the fact that the brine used for salt production does not
23 “typically come directly” from San Francisco Bay, it ignores the fact that the brine does originate as
24 Bay water, and that other waters at the Site do enter directly from San Francisco Bay. Similarly,
25 EPA’s attempt to distinguish *Froehlke* based on the argument that the salt ponds in that case
26 “received water directly from the Bay,” while the Site “only receives brines that have achieved target
27 salinity levels,” *see* EPA Br. at 25, fails to acknowledge these facts and is a distinction without a
28 difference.

1 3. EPA Ignored Region 9’s Findings and Failed to Explain its Reversal of
2 Position

3 EPA’s Final JD is a wholesale reversal of the reasoned findings and thoughtful conclusions of
4 the Region 9 JD. That reversal is unexplained by the administrative record, and the factual
5 underpinnings of the Region 9 JD were either ignored by EPA in its final decision or glossed over in
6 the agency’s cursory jurisdictional analysis. These errors render the Final JD arbitrary and
7 capricious.

8 When an agency departs from a prior policy, it must provide a “reasoned analysis” for doing
9 so. *State Farm*, 463 U.S. at 42; *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009); *see*
10 *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (finding that “even
11 when reversing a policy after an election, an agency may not simply discard prior factual findings
12 without a reasoned explanation”). This requirement includes that an agency actually display
13 “awareness that it is changing position.” *Fox Television*, 556 U.S. at 515. Although the Region 9 JD
14 is denoted as a “draft,” it reflects the consummation of Region 9’s analysis of the Site and contains no
15 comments, redline edits, or other features typical of a work in progress. Yet neither the Region 9 JD
16 itself nor its analytical framework is discussed or rebutted in the Final JD, and the sparse
17 administrative record during the time period between the two documents¹⁰ provides no basis to find
18 that EPA was “aware” of its radical change of view. This omission renders the final decision
19 arbitrary and capricious.

20 Even if the Region 9 JD is insufficiently “final” to warrant due consideration under the *Fox*
21 *Television* standard, the flagrant and unresolved inconsistencies between it and the Final JD “serve as
22 evidence of” the final decision’s arbitrariness and capriciousness. *WildEarth Guardians v.*
23 *Provencio*, 923 F.3d at 666; *see also Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1134 (9th Cir.
24 2011) (finding prior agency discussions relevant to the question of whether the agency had the

25 ¹⁰ The administrative record filed by EPA includes *only six documents* dated between Region 9’s
26 November 21, 2016 Draft Affirmative Jurisdictional Determination and Administrator Wheeler’s
27 March 1, 2019 Negative Jurisdictional Determination. ECF No. 53-3 (AR 2036, AR 2038, AR 2868,
28 AR 2869, AR 2870, and AR 2872). An additional nine documents dated during this approximately
24-month period appear on EPA’s privilege log. ECF No. 66-1 (Item Nos. 2, 3, 4, 5, 6, 7, 8, 10, and
11). None of these documents appear to address the factual findings and analytical conclusions of the
Region 9 JD.

1 awareness of certain potential impacts of a proposed action thus negating the agency’s argument that
2 plaintiffs waived their challenges under the National Environmental Policy Act); *Ctr. for Biological*
3 *Diversity v. Zinke*, 868 F.3d at 1060–61 (finding earlier draft that conflicted with agency’s later
4 conclusions relevant to review of that decision under the APA). As the Ninth Circuit has noted, in
5 these circumstances the reviewing court’s task “is to review the change of course to ensure that it is
6 based on new evidence or otherwise based on reasoned analysis.” *Zinke*, 868 F.3d at 1061.
7 Accordingly, other courts within this District have rejected the government’s plea to disregard an
8 agency’s “preliminary statements” on a matter and instead found the contents of those statements to
9 be evidence of an arbitrary and capricious final decision. *See, e.g., Desert Survivors v. U.S. Dep’t of*
10 *Interior*, 321 F. Supp. 3d at 1043–44.

11 Here, the factual findings and analytical conclusions contained in EPA’s Final JD are directly
12 inapposite to the conclusions reached in the Region 9 JD. The Region 9 JD concluded that 1,270
13 acres of the Site are jurisdictional waters under the CWA. And as a predicate to that finding, Region
14 9 concluded these jurisdictional waters were not converted to fast land prior to the enactment of the
15 CWA. By finding the entire Site to be non-jurisdictional fast land, the Final JD effectively ignores
16 Region 9’s conclusion and many of the factual details on which the conclusion rests. Moreover, the
17 Final JD does not even *acknowledge* the Region 9 JD, let alone attempt to explain why it reached the
18 opposite conclusion based on the same information.

19 EPA attempts to downplay any “potential for disagreement” between the Region 9 JD and the
20 final decision by pointing to the latter’s statement that the “presence of process water in the industrial
21 salt production ponds does not transform non-jurisdictional upland containing an industrial facility
22 into a water of the United States.” Dkt. #56, EPA Mot. at 29–30 (quoting AR 1 at 15 (Final JD)).
23 But the final decision fails to mention, let alone distinguish, many of the factual findings relied upon
24 by Region 9 in reaching its opposite conclusion. On this point, in particular, the final decision is
25 conclusory, stating without further explanation that “[p]rocess water and brine at the plant is simply a
26 component of a highly engineered industrial operation that bears no relationship to the aquatic
27 system.” AR 1 at 15 (Final JD).

1 Region 9 had previously concluded that the composition of the water does not matter for the
2 purposes of a jurisdictional determination and that the water in the salt ponds is in fact significant for
3 both the aquatic system as well as the larger ecosystem. Region 9 JD at 18–20. EPA ultimately
4 ignored these findings and the supporting evidence in the record when it disregarded the Region 9 JD.
5 This failure to “consider an important aspect of the problem” is further evidence of the arbitrary and
6 capricious nature of EPA’s Final JD. *State Farm*, 463 U.S. at 43; *see also Provencio*, 923 F.3d at
7 666.

8 **VI. REMEDY**

9 Because EPA’s decision was arbitrary, capricious, and contrary to law, the Court should hold
10 it unlawful and set it aside under the APA. 5 U.S.C. § 706(2)(A) (“The reviewing court shall ... set
11 aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of
12 discretion, or otherwise not in accordance with law”). Under this mandatory language, vacatur of
13 illegal agency action is the standard remedy for an APA claim. *See, e.g., All. for the Wild Rockies v.*
14 *U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) (“[V]acatur of an unlawful agency action
15 normally accompanies a remand.”); *Se. Alaska Conserv. Council v. U.S. Army Corps of Eng’rs*, 486
16 F.3d 638, 654 (9th Cir. 2007) (“Under the APA, the normal remedy for an unlawful agency action is
17 to ‘set aside’ the action”), *rev’d on other grounds sub nom. Coeur Alaska v. Bonneville Power*
18 *Admin.*, 557 U.S. 261 (2009); *State of California v. U.S. Dep’t of the Interior*, 381 F. Supp. 3d 1153,
19 1178 (N.D. Cal. 2019) (“Vacatur is the ‘standard remedy’ when a court concludes that an agency’s
20 conduct was illegal under the APA”) (citation omitted).

21 “[C]ourts in the Ninth Circuit decline vacatur only in rare circumstances.” *Klamath-Siskiyou*
22 *Wildlands Ctr. v. Nat’l Oceanic & Atmospheric Admin. Nat’l Marine Fisheries Serv.*, 109 F. Supp. 3d
23 1238, 1242 (N.D. Cal. 2015). In unusual cases, such as where irreparable environmental injury
24 would result, equity may demand that an unlawful agency decision be remanded without vacatur, *see*
25 *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. C04-04324 WHA, 2005 WL 2000928,
26 at *16 (N.D. Cal. Aug. 19, 2005). However, the burden lies with the government to show why
27 vacatur would not be appropriate. *See Ctr. for Env’tl. Health v. Vilsack*, No. 15-cv-01690-JSC, 2016
28 WL 3383954, at *13 (N.D. Cal. June 20, 2016) (“[G]iven that vacatur is the presumptive remedy for

1 a procedural violation such as this, it is Defendants' burden to show that vacatur is unwarranted.").
2 No such circumstances exist here, and EPA's Final JD should be vacated and remanded to the
3 Agency.

4 **VII. CONCLUSION**

5 For the foregoing reasons, Plaintiffs' Cross-Motion should be granted.
6

7 Dated: April 9, 2020

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Executed this 9th day of April, 2020, at Burlingame, California.

ERIC J. BUESCHER